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**IN THE SUPREME COURT OF THE STATE OF MONTANA**

Cause No.: \_\_\_\_\_

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STATE OF MONTANA, EX REL. DEPARTMENT OF ENVIRONMENTAL  
QUALITY,

PLAINTIFF / APPELLANT,

v.

BNSF RAILWAY COMPANY,

DEFENDANT / APPELLEE,

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**FILED**

SEP 14 2009

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

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**NOTICE OF APPEAL**

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Appearances:

R. Allan Payne  
Marc G. Buyske  
DONEY CROWLEY BLOOMQUIST  
PAYNE UDA PC  
Diamond Block, Suite 200  
44 West 6th Avenue  
P.O. Box 1185  
Helena, MT 59624-1185  
Telephone: (406) 443-2211  
Facsimile: (406) 449-8443  
Email: rpayne@doneylaw.com

*Attorneys for Appellant*

Cynthia D. Brooks  
Special Assistant Attorney General  
MONTANA DEPARTMENT OF  
ENVIRONMENTAL QUALITY  
1100 North Last Chance Gulch  
P.O. Box 200901  
Helena, MT 59620-0901  
Telephone: (406) 841-5020  
Facsimile: (406) 841-5050  
Email: cbrooks@mt.gov

*Attorney for Appellant*

Leo Berry / Oliver H. Goe / Mark D.  
Etchart / Chad E. Adams  
BROWNING, KALECZYC, BERRY &  
HOVEN, P.C.  
825 Great Northern Blvd., Suite 105  
Helena, MT 59601  
Telephone: (406) 443-6820  
Facsimile: (406) 43-6895

*Attorneys for Appellee*

Paul J. Lawrence  
KIRKPATRICK & LOCKHART PRESTON  
GATES ELLIS, LLP  
925 Fourth Avenue Suite 2900  
Seattle, WA 98104-1158  
Telephone: (206) 623-7580  
Facsimile: (206) 623-7022

*Attorneys for Appellee*

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On Appeal from the First Judicial District Court, Lewis and Clark County  
The Honorable Jeffrey M. Sherlock, Presiding  
District Court Cause No. BDV 2004-596

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FILED \_\_\_\_\_, 2009.  
\_\_\_\_\_, Clerk

NOTICE is given that STATE OF MONTANA, EX REL. DEPARTMENT OF ENVIRONMENTAL QUALITY, the Appellant above-named and Plaintiff in that cause of action filed in the First Judicial District, in and for the County of Lewis and Clark, as Cause No. BDV-2004-596, hereby appeals to the Supreme Court of the State of Montana from the following portions of the final judgments or orders entered in such action:

1. The conclusion of law that apportionment is available as a defense to actions under Montana's Comprehensive Environmental Cleanup and Responsibility Act ("CECRA"), Mont. Code Ann. §§ 75-10-701 *et seq.* See, Findings of Fact, Conclusions of Law, and Order, dated February 10, 2009, pp. 22-23, ¶¶ 15-16.

2. The conclusion of law that Defendant's abatement of the contamination from the subject facilities ordered by the District Court under CECRA authority (Mont. Code Ann. § 75-10-711(8)) does not require compliance with the Plaintiff's Record of Decision ("ROD") KRY Site, Kalispell, Montana, issued June 2008, under Plaintiff's CECRA authority (Mont. Code Ann. §§ 75-10-721) until that ROD has been approved by a Court. See, Final Unified Abatement Order, dated August 13, 2009, p. 3, ll. 12-14.

3. The denial of Plaintiff's claim of public nuisance. See, Order on Pre-Trial Motions, dated February 15, 2008.

4. The District Court conclusion in ¶ 2 of its Final Unified Abatement Order that Defendant BNSF Railway Company was ready, willing, and able to conduct the abatement under CECRA is not supported by a finding of fact or the factual record.

5. The Court's evidentiary decision at trial allowing Mr. Pat Keim to provide expert witness testimony. See, Trial Transcript, p. 1232 l. 15 through p. 1236 l. 14.

**THE APPELLANT FURTHER CERTIFIES:**

1. That this appeal is not subject to the mediation process required by M.R.App.P. 7.

2. That this appeal is not an appeal from an order certified as final under M.R.Civ.P. 54(b).

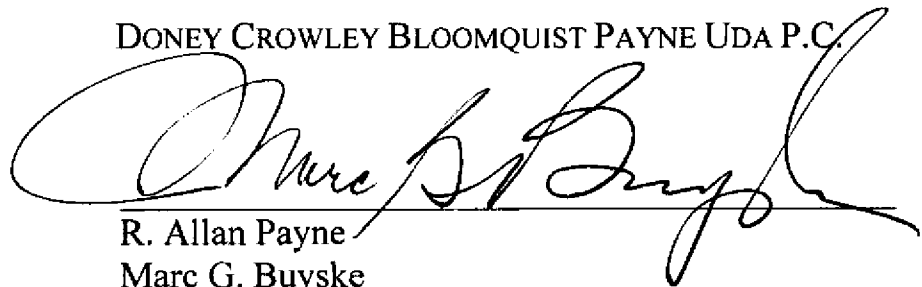
3. That the notice required by M.R.App.P. 27 is not applicable in this appeal;

4. That all available transcripts of the proceedings in this cause have been ordered from the court reporter contemporaneously with the filing of this Notice of Appeal.

5. The Appellant is a governmental entity not required to pay fees pursuant to Mont. Code Ann. § 25-10-405.

DATED this 14<sup>th</sup> day of September, 2009.

DONEY CROWLEY BLOOMQUIST PAYNE UDA P.C.

A large, stylized handwritten signature in black ink, which appears to read "Marc G. Buyske". The signature is written over a horizontal line.

R. Allan Payne

Marc G. Buyske

*Attorneys for Appellant*

## CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing *Notice of Appeal* with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing *Notice of Appeal* upon the Clerk of the District Court, each attorney of record, and each party not represented by an attorney in the above-referenced District Court action, as follows:

Nancy Sweeney, Clerk of District Court  
Montana First Judicial District Court  
Lewis and Clark County  
P.O. Box 158  
Helena, MT 59624-0158

Cynthia D. Brooks  
Montana Department of Environmental Quality  
Remediation Division  
P.O. Box 200901  
Helena, MT 59620-0901  
Attorney for Appellant DEQ

Leo Berry / Oliver H. Goe / Mark D. Etchart / Chad E. Adams  
Browning, Kaleczyc, Berry & Hoven, P.C.  
PO Box 1697  
Helena, MT 59624  
Attorney for Appellee BNSF Railway Company

Paul J. Lawrence  
Kirkpatrick & Lockhart Preston Gates Ellis, LLP  
925 Fourth Avenue Suite 2900  
Seattle, WA 98104-1158  
Attorney for Appellee BNSF Railway Company

Karl K. Rudbach  
Kaufman, Vidal, Hileman & Ramlow, P.C.  
22 Second Avenue West, Suite 4000  
P.O. Box 728  
Kalispell, MT 59903-0728  
Attorney for Kalispell Pole & Timber Company

Stephen H. Foster / Shane Coleman / Kyle A. Gray  
Holland & Hart, LLP  
401 North 31st Street, Suite 1500  
P.O. Box 639  
Billings, MT 59103-0639  
Attorney for Exxon Mobile Corporation

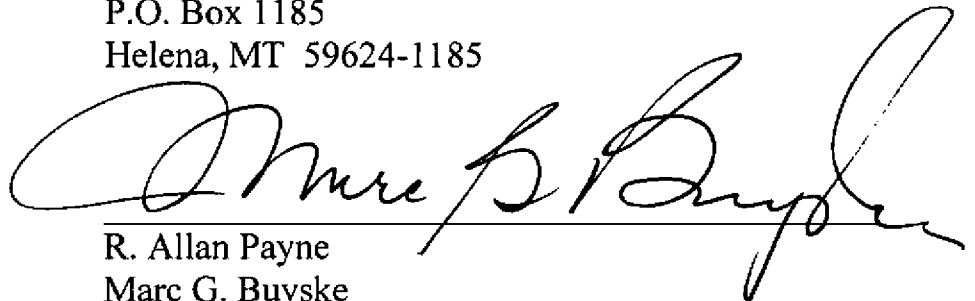
Gregory A. Van Horssen  
Keller, Reynolds, Drake, Johnson & Gillespie, P.C.  
Guardian Bldg., Third Floor  
50 South Last Chance Gulch  
P.O. Box 598  
Helena, MT 59624  
Attorney for Montana Mokko, Incorporated

Paul A. Sandry  
Johnson, Berg, McEvoy & Bostock, PPLP  
221 First Avenue East  
P.O. Box 3038  
Kalispell, MT 59903-3038  
Attorney for Klingler Lumber Company, Inc. and Swank Enterprises

Tommy Butler  
Montana Dept. of Natural Resources & Conservation  
1625 Eleventh Ave.  
P.O. Box 201601  
Helena, MT 59620-1601  
Attorney for DNRC

DATED this 14<sup>th</sup> day of September, 2009.

DONEY CROWLEY BLOOMQUIST PAYNE UDA P.C.  
Diamond Block, Suite 200  
44 West 6th Avenue  
P.O. Box 1185  
Helena, MT 59624-1185

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R. Allan Payne  
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